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No. 04-831

IN THE

Supreme Court of the United States

ILLINOIS CENTRAL RAILROAD COMPANY and
MISSISSIPPI DEPARTMENT OF TRANSPORTATION,
Petitioners,

v.

KELLI SMALLWOOD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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MOTION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* AND BRIEF FOR THE AMERICAN SECURITY INSURANCE COMPANY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

WALTER D. WILLSON *
RICHARD G. NORRIS, II
WELLS MARBLE & HURST, PLLC
600 Lamar Life Building
317 East Capitol Street
Jackson, Mississippi 39201

* Counsel of Record

Counsel for American Security Insurance Company

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

Illinois Central Railroad Company and Mississippi Department of Transportation's petition for certiorari is before this Court as a result of a en banc opinion issued from the Fifth Circuit Court of Appeals which, if not corrected, will drastically alter the procedure governing, and the applicability of, the doctrine of fraudulent joinder. If left uncorrected, said opinion will drastically alter a diverse defendant's ability to remove a matter despite the presence of diversity jurisdiction as determined by what is well-established law.

American Security Insurance Company wishes to file an amicus brief in support of Petitioners because the underlying opinion and its implications will directly effect many of the

current and future cases in which ASIC is involved. Indeed, the import of the issues presented in the underlying opinion far exceed the ramifications which will be felt by the actual parties in this matter. Said ramifications will be felt by every diverse defendant against whom a suit is improperly brought.

If ASIC is allowed to file the attached brief, ASIC believes such will help bring several issues and concerns to light which were not discussed in Illinois Central Railroad Company and Mississippi Department of Transportation's petitions for certiorari. Namely, that the so-called "common defense rule" has been overruled and discarded, if it ever existed to begin with, and has no place is modern jurisprudence.

More specifically, pursuant to binding precedent issued by this Court, a district court may not apply the "common defense rule" before it has ruled on the jurisdictional inquiry. Moreover, once the jurisdictional inquiry has been made and satisfied, a district court may not apply the "common defense rule" to remand an action. In the first instance, application of the "rule" brings the merits question before the subject matter jurisdictional inquiry. In the latter, application of the "rule" ignores the federal court's unflagging obligation to exercise the jurisdiction given them and the diverse defendant's right to a federal forum in diversity matters. In both instances, application of the "rule" works a "treason" unto the Constitution. Modern jurisprudence, thus, indicates that the "rule," if ever in effect, is no more, it has been overruled.

ASIC respectfully requests this court grant it leave to file the attached amicus brief in support of Petitioners to more fully develop these issues for the Court.

In accordance with Supreme Court Rule 37(2), the undersigned has contacted counsel for all parties regarding the filing of this brief. Both Petitioners Illinois Central Railroad Company and Mississippi Department of Transportation have

consented to the filing of this brief. Respondent Smallwood, however, has withheld consent for ASIC to file this brief rendering the instant motion necessary.

Respectfully submitted,

WALTER D. WILLSON *
RICHARD G. NORRIS, II
WELLS MARBLE & HURST, PLLC
600 Lamar Life Building
317 East Capitol Street
Jackson, Mississippi 39201

* Counsel of Record

Counsel for American Security Insurance Company

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BRIEF OF AMERICAN SECURITY INSURANCE COMPANY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE* [1]

American Security Insurance Company ("ASIC") is a corporation organized and existing under the laws of the state of Delaware with its principal place of business in the state of Georgia. ASIC is interested in the instant action as the same will directly effect many of the current and future cases in which ASIC is involved. Indeed, the import of the issues presented in the underlying opinion far exceed the ram-

[1] This brief was not authored in whole or in part by counsel for any party in this case, and no one other than *amici* and their counsel made any monetary contribution to its preparation or submission. S. Ct. R. 37.6.

ifications which will be felt by the actual parties in this matter. Said ramifications will be felt by every diverse defendant, including ASIC, against whom a suit is improperly brought. Further, the underlying Fifth Circuit opinion which gives rise to Illinois Central Railroad Company and Mississippi Department of Transportation's petition for certiorari evidences a divide between the circuits of this nation. ASIC is directly affected by this divide inasmuch as it conducts interstate, and inter-circuit, business and is, therefore, subjected to differing procedures governing the doctrine of fraudulent joinder and the determination of whether federal jurisdiction is present. ASIC will be directly benefitted if this Court's grants certiorari in this matter and overrules the Fifth Circuit's en banc opinion.

SUMMARY OF THE ARGUMENT

It is clear the "common defense" rule espoused by the Fifth Circuit in *Smallwood v. Illinois Central R.R. Co.*, 2004 WL 2047314 (5th Cir. Sep 10, 2004), and the Third Circuit in *Boyer v. Snap-On Tools Corp.*, 913 F. 2d 108 (3rd Cir. 1990), finds no support in this Court's opinion in *Chesapeake & Ohio Railway Co. v. Cockrell*, 232 U.S. 146 (1914). Even assuming such is not the case, however, modern jurisprudence's treatment of the rule's necessary implications indicates that it has been overruled and discarded.

The "common defense" rule holds that any defense or grounds which may negate liability as to both the diverse and non-diverse defendants alike cannot form the proper predicate of a fraudulent-joinder-based-removal. This holding is based primarily upon this Court's language in *Cockrell* to the effect that the railway's "showing manifestly went to the merits of the action as an entirety, and not to the joinder; that is to say, it indicated that the plaintiff's case was ill founded as to all the defendants." Under the "common defense" rule, then, any defense or grounds which may operate to negate liability as to

both the diverse and non-diverse defendants alike goes "to the merits of the action as an entirety."

This Court has stated, since rendering *Cockrell*, that the subject matter jurisdictional inquiry must be asked and answered first. This is true even when the "merits question is more readily resolved and the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied." Thus, when the jurisdictional inquiry turns on the application of a defense to the claims against a non-diverse defendant (as it does in every case in which the "common defense" rule may be deemed applicable), the defense, if not applied solely to the non-diverse defendant first, goes "to the merits" of the action. This under modern jurisprudence cannot be done until after the (subject matter) jurisdictional inquiry has been made. The "common defense" rule, thus, cannot be utilized before the jurisdictional inquiry has been made.

Once jurisdiction is determined to be present, the federal courts have a "virtually unflagging" obligation to exercise the same. The judiciary "has no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution." Likewise, a diverse defendant has a right to a federal forum pursuant to Title 28, Section 1441(a) if diversity jurisdiction is present. Consequently, the "common defense rule" cannot be utilized to effect a remand after subject matter jurisdiction has been deemed present. The "common defense" rule, thus, even if it finds support in the *Cockrell* opinion, which it does not, has no place in modern jurisprudence.

ARGUMENT

Illinois Central Railroad Company ("ICRC") and Mississippi Department of Transportation's ("MDOT") petition for certiorari is before this Court as a result of an en banc opinion

issued by a near-evenly divided Fifth Circuit Court of Appeals. That opinion, which follows the Third Circuit Court of Appeals' decision in *Boyer v. Snap-On Tools Corp.*, 913 F. 2d 108 (3rd Cir. 1990), finds that this Court, more than ninety years ago in *Chesapeake & Ohio Railway Co. v. Cockrell*, 232 U.S. 146 (1914), held that a defense which is equally applicable to both a diverse and non-diverse defendant alike cannot form the proper predicate of a fraudulent-joinder-based removal. That very proposition has been rejected by the Ninth and Seventh Circuit Courts of Appeal. *See Ritchey v. Upjohn Drug Company*, 139 F. 3d 1313, 1318-20 (9th Cir. 1998); *LeBlang Motors, Ltd. v. Suburu of America, Inc.*, 148 F. 3d 680, 691-92 (7th Cir. 1998). Thus, the determination and existence of federal subject matter jurisdiction now differs from circuit to circuit and court to court.

The subject Fifth Circuit opinion, *Smallwood*, and its predecessor, the Third Circuit opinion *Boyer*, create an exception to the tenets of modern federal jurisdiction. This exception, which has come to be known as the "common defense" rule, is not supported by *Cockrell*, the opinion both offending circuits credit with providing the gravamen of the rule. And, even if solid precedent existed in support of the rule, of which there is none, modern jurisprudence's treatment of the rule's necessary implications indicates that it has been overruled and discarded. This Court should, thus, grant ICRC and MDOT's petition for certiorari and reverse the Fifth Circuit's en banc opinion to finally resolve this issue of dire import and rebalance the equities of jurisdiction throughout the federal courts.

I. JURISDICTION MUST BE DETERMINED FIRST

This Court has repeatedly and abundantly made clear that the existence of jurisdiction is paramount. "Without jurisdiction a court cannot proceed at all in any cause." *Steel Co.*

v. Citizens for a Better Environment, 523 U.S. 83, 94 ('9[illegible] (quoting *Ex parte McCardle*, 74 U.S. 506 (1868)). Whe jurisdiction does not exist, or if it ceases to exist, the only authority the court maintains is to announce the lack the jurisdiction and dismiss the case. *Id.* (quoting *McCardle*, 74 U.S. at 506).

For these reasons, jurisdiction has been deemed a "threshold matter [that] 'springs from the nature and limits of the judicial power of the United States.'" *Id.* (quoting *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)). It is the "first and fundamental question," *Id.* (quoting *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900)), and it is "inflexible and without exception." *Id.* at 95 (quoting *Mansfield*, 111 U.S. at 382). Indeed, the jurisdictional inquiry is of such import, "the court is bound to ask and answer it for itself" even when not argued by the parties. *Id.* at 94 (quoting *Jones*, 177 U.S. at 453).

Noting these most basic jurisdictional tenets and precepts, this Court recently held that subject matter jurisdiction must be established *before* a court may delve into the merits of a case. *Id.* In point of fact, the Court held that the (subject matter) jurisdictional inquiry must be made and answered first even when the "merits question is more readily resolved and the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied." *Id.* at 93. In other words, subject matter jurisdiction is not a hollow formality that may be overcome by economy or other concerns no matter how legitimate they may be. Subject matter jurisdiction is a requisite without exception. It must always be determined first.

II. A DEFENDANT HAS BEEN FRAUDULENTLY JOINED WHEN NO CAUSE OF ACTION CAN BE SUPPORTED AGAINST HIM/HER UNDER STATE LAW

As early as 1913, this Court stated that a court need not determine more than "whether there was a colorable ground for [the plaintiff's cause of action against the non-diverse defendant]" before it could determine whether the non-diverse defendant had been fraudulently joined. *Chicago, Rock Island & Pacific R.R. Co. v. Schwyhart*, 227 U.S. 184, 194 (1913). *See also Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176 (1907); *Lathrop, Shea & Henwood Co. v. Interior Constru. & Improvement Co.*, 215 U.S. 246 (1909). If there were colorable grounds for the plaintiff's claim, the non-diverse defendant would be deemed properly joined and diversity incomplete. If there were not colorable grounds for the plaintiff's claim, the non-diverse defendant would be deemed fraudulently joined and his citizenship disregarded for diversity purposes.

This rule, this doctrine of jurisprudence, has been followed by the inferior courts of appeal since its pronouncement over a 100 years ago. Indeed, the Fifth Circuit, citing *Wecker*, 203 U.S. at 176, noted as early as 1958 that "if the plaintiff's petition fails to state a cause of action against the resident defendant" the joinder "will be regarded as a fraudulent joinder for the purpose of defeating the jurisdiction of the federal court, and . . . will be ineffective to prevent the removal of a case otherwise removable upon the ground of diversity jurisdiction." *Covington v. Indemnity Ins. Co. of North American*, 251 F.2d 930, 934 (5th Cir. 1958) (citing *Wecker*, 203 U.S. at 176).

Consequently, the law governing fraudulent joinder, as based upon a near century-old pronouncement from this Court, is well-settled and clear: a defendant is fraudulently joined if there is no reasonable possibility of recovery against

him/her in state court. *See Schwyhart*, 227 U.S. at 194; *Wecker*, 204 U.S. at 176; *Lathrop*, 215 U.S. at 246. Moreover, if there is no reasonable possibility of recovery against the defendant in state court, his/her citizenship is disregarded for diversity purposes and federal jurisdiction is present.

III. THE FIFTH AND THIRD CIRCUITS' INTERPRETATION OF *COCKRELL* HAS BEEN OVERRULED

Assuming, for sake of argument only, that *Cockrell* states the proposition which the Fifth and Third Circuits cite it, it has been overruled by the aforementioned dictates of modern federal jurisprudence as explicitly set forth by this Court. Specifically, the Fifth and Third Circuits hold that any defense or grounds which may negate liability as to both the diverse and non-diverse defendants alike cannot form the proper predicate of a fraudulent-joinder-based-removal. This holding is based primarily upon this Court's language in *Cockrell* to the effect that the railway's "showing manifestly went to the merits of the action as an entirety, and not to the joinder; that is to say, it indicated that the plaintiff's case was ill founded as to all the defendants." *Cockrell*, 232 U.S. at 153.

In *Cockrell*, the railway's "showing" was but a mere denial of the facts upon which the plaintiff based his claims against the non-diverse defendants. The Fifth and Third Circuits, though, state that this "showing" may be comprised of any defense and, indeed, any grounds, which are common to both the diverse and non-diverse defendants. Consequently, pursuant to this reasoning and the plain language of *Cockrell*, any defense or grounds which may operate to negate liability as to both the diverse and non-diverse defendants alike goes "to the merits of the action as an entirety." *Id.* at 153. Therein lies the dilemma. If the application of a defense or

grounds goes "to the merits" of an action, application of the same cannot be made until after the (subject matter) jurisdictional inquiry has been made. *Steel Co.*, 523 U.S. at 94.

As a result, under the Fifth and Third Circuits' interpretation, defenses and/or grounds which may clearly and obviously negate the liability of a non-diverse defendant must be judicially ignored when determining if the non-diverse defendant has been fraudulently joined. Indeed, defenses and grounds which clearly indicate the plaintiff fraudulently joined the non-diverse defendant solely to defeat and destroy diversity jurisdiction must be ignored. Consequently, matters in which a non-diverse defendant has been joined, but clearly cannot be liable, i.e., matters wherein diversity jurisdiction exists, will be remanded to state court and the doctrine of fraudulent joinder will be rendered a nullity.

Modern jurisprudence indicates that such is neither the system contemplated (by either Congress or this Court) nor the system in place. The (subject matter) jurisdictional inquiry must be made first. *Id.* In making this inquiry, every defense which may negate liability as to the non-diverse defendant must be taken into account as any such defense may indicate that the non-diverse defendant was fraudulently joined. On the other hand, the applicability of a defense as to a diverse defendant cannot be considered - such is not part of the jurisdictional inquiry. The jurisdictional inquiry focuses solely on the plaintiff's possibility of recovery against the non-diverse defendant in state court. The district court's focus cannot be arbitrarily shifted from the former to the latter.

Accordingly, it must be taken that either *Cockrell* does not state the proposition for which the Fifth and Third Circuits cite it, or *Cockrell* has been overruled. In either case, the "common defense rule" as espoused by the offending circuits is wholly inapplicable in determining if a non-diverse

defendant has been fraudulently joined. What is more, it is wholly incapable of preventing a federal court from considering any defense which may render a non-diverse defendant fraudulently joined. Hence, if a defense, even a common defense, renders the plaintiff's joinder of the non-diverse defendant fraudulent, diversity is complete and federal jurisdiction is proper.

IV. THE FEDERAL COURTS MUST EXERCISE THE JURISDICTION GIVEN THEM

Once diversity is deemed complete (assuming the amount in controversy is met), diversity jurisdiction is present. Once jurisdiction is present, the federal courts have a "virtually unflagging" obligation to exercise the same. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Indeed, as this Court noted almost two-hundred years ago in *Cohens v. Virginia*, "[the judiciary] has no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution." 19 U.S. 264, 265 (1821). *See also Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996); *Colorado River*, 424 U.S. at 817; *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 415 (1964); *McCellan v. Carland*, 217 U.S. 268, 282 (1910); *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40 (1909); *Chicot County v. Sherwood*, 148 U.S. 529, 534 (1893).

Much analogous to the federal court's unflagging obligation to exercise the jurisdiction given them is the diverse defendant's right to a federal forum. Pursuant to Title 28, Section 1441(a), a diverse defendant may remove a matter wherein diversity jurisdiction is present to the district court embracing the place where the action is pending. *See* 28 U.S.C. § 1441(a). This important right is only limited in two respects: the amount in controversy must be met and the removing defendant cannot be a resident of the forum state.

See 28 U.S.C. §§ 1332, 1441(b). Provided these requirements are met, the diverse defendant has an incontestable right to have the matter heard by a federal court. *See* 28 U.S.C. § 1441.

Consequently, the "common defense rule" cannot be utilized to effect a remand after subject matter jurisdiction has been deemed present. Indeed, the federal court's "unflagging obligation" to exercise the jurisdiction given it and the diverse defendant's incontestable right to a federal forum (upon the existence of diversity jurisdiction) cannot be overcome by an arbitrary rule. Such would act as a "treason" to the Constitution and would unravel the system created by Congress. Once diversity jurisdiction is deemed present, the federal court's obligation to exercise the same is a constitutional imperative. As a result, the "common defense rule" may not be used to remand a matter after the (subject matter) jurisdictional inquiry has been made.

CONCLUSION

The "common defense rule" has no place in modern jurisprudence. Pursuant to binding United States Supreme Court precedent, a district court may not apply the "common defense rule" before it has ruled on the jurisdictional inquiry. Moreover, once the jurisdictional inquiry has been made and satisfied, a district court may not apply the "common defense rule" to remand an action. In the first instance, application of the "rule" brings the merits question before the (subject matter) jurisdictional inquiry. In the latter, application of the "rule" ignores the federal court's unflagging obligation to exercise the jurisdiction given them and the diverse defendant's right to a federal forum in diversity matters. In both instances, application of the "rule" works a "treason" unto the Constitution. Modern jurisprudence, thus, indicates that the "rule," if ever in effect, is no more, it has been overruled. Accordingly, this Court should grant Illinois

Central Railroad Company and Mississippi Department of Transportation's petition for certiorari to finally remedy this issue, conclusively resolve the split in the circuits regarding the issue and, once again, restore continuity to the rules and law governing the determination and existence of federal jurisdiction.

Respectfully submitted,

WALTER D. WILLSON *
RICHARD G. NORRIS, II
WELLS MARBLE & HURST, PLLC
600 Lamar Life Building
317 East Capitol Street
Jackson, Mississippi 39201

* Counsel of Record

Counsel for American Security Insurance Company